



California Fair Political Practices Commission

January 25, 1989

Scott C. Smith, Esq.
Best, Best & Krieger
Attorneys at Law
P. O. Box 1028
Riverside, CA 92502

Re: Your Request for Advice
Our File No. I-88-456

Dear Mr. Smith:

This is in response to your request for advice concerning whether the Political Reform Act^{1/} prohibits Patrick Gatti, a member of the La Verne City Council, from participating in decisions affecting the University of La Verne. Since your request seeks general guidance as to future actions, we treat the request as one for informal assistance.^{2/}

QUESTION

Does the Political Reform Act ("the Act") prohibit Councilmember Gatti from participating in decisions affecting the University of La Verne ("the University")?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3), copy enclosed.)

CONCLUSION

Councilmember Gatti is prohibited from participating in any decision by the City Council that will foreseeably have a direct effect on the University. Subject to the monetary effect on the University as set forth under Regulation 18702.5, he may also be prohibited from participating in any decision that will foreseeably have an indirect effect on the University. However, he may participate in any decision if its effect on the University, whether direct or indirect, is not distinguishable from its effect on the public generally.

FACTS

Patrick Gatti is a member of the La Verne City Council. He also is the sole owner of a florist shop in the City of La Verne ("the city") that receives business income in excess of \$250 each year from the University.

The University is located in the city and is a private, non-profit institution.

ANALYSIS

Section 87100 sets forth the general rule concerning potential conflicts of interest confronting public officials. It states:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

As a councilmember for the city, Mr. Gatti is a "public official" of a "local government agency" and therefore is subject to the coverage of Section 87100. (Sections 82048 and 82041.)

Section 87103 defines "financial interest in a decision" within the meaning of section 87100. It states that a public official has the requisite financial interest if:

... it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official ... or on:

(c) Any source of income ... aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to a public official within 12 months prior to the time when the decision is made

Because Councilmember Gatti is the sole owner of the florist shop, each customer who spent \$250 or more at the shop in the preceding 12 months is a source of income of \$250 or more to him. (Section 82030(a).)

However, Section 87103.5 provides an exception to the general "source of income" rule set forth in Section 87103(c). Section 87103.5 states:

Notwithstanding subdivision (c) of Section 87103, a retail customer of a business entity engaged in retail sales of goods or services to the public generally is not a source of income to an official who owns a 10-percent or greater interest in the entity if the retail customers of the business entity constitute a significant segment of the public generally, and the amount of income received by the business entity from the customer is not distinguishable from the amount of income received from its other retail customers.

On the basis of these sections, if the retail customers of Councilmember Gatti's business constitute a significant segment of the public and income received from them is not distinguishable from the income received from the University, then the University's payments to the business are not considered to be income. In that case, Councilmember Gatti may participate in decisions concerning the University.

Regulation 18703.5 (copy enclosed) defines, for the purposes of Section 87103.5, when customers of a retail business constitute a significant segment of the public and when the income received from one retail customer is not distinguishable from the income received from others. Regulation 18703.5, in pertinent part, states:

(a) For purposes of Government Code Section 87103.5, the retail customers of a business entity constitute a significant segment of the public generally if either of the following is true:

(1) The retail customers of the business entity during the preceding 12 months are sufficient in number to equal 10 percent or more of the population or households of the jurisdiction; or

(2) The retail customers of the business entity during the preceding 12 months number at least ten thousand.

For purposes of this subdivision, a customer of a retail business entity is each separate and distinct purchaser of goods or services, whether an individual, household, business or other entity. If records are not maintained by customer name, a good faith estimate shall be made to determine what percentage of sales transactions represent multiple transactions by repeat customers. The total number of sales transactions shall then be reduced by the estimated percentage of repeat customers to yield the number of customers for purposes of applying this subdivision.

(b) For purposes of Government Code Section 87103.5, the amount of income received by a business entity from a retail customer is not distinguishable from the amount of income received from its other retail customers if the amount spent by the customer in question during the preceding 12 months is less than one-tenth of 1 percent of the gross sales revenues of the retail business entity for the preceding fiscal year....

Since the University provides in excess of \$250 to Councilmember Gatti's solely owned business each year, it is potentially a source of income to him under Section 87103. However, an analysis initially must be made to determine whether the exception set forth in Section 87103.5 applies. As mentioned, if it does, then Councilmember Gatti is not prohibited from participating in decisions concerning the University.

You have not supplied us with any facts in order to make this determination. If you are able to obtain this information and submit it to us we will attempt to analyze it as described above. Otherwise, for the purposes of this analysis, we will assume that the Section 87103.5 exception does not apply and that the University is a "source of income" to Councilmember Gatti. In such a case, the next question is whether it is foreseeable that any given decision in which Councilmember Gatti participates will have a material financial effect, distinguishable from its effect on the public generally, on the University.

The question posed is meant to apply to decisions that may confront the La Verne City Council in the future. Each decision and its effect upon the University is, therefore, speculative at this point and not capable of a specific analysis by the Commission. However, in the discussion below, we will attempt to set forth the general analysis that the Commission would apply in determining whether Councilmember Gatti faces a conflict of interest.

The first determination in the analysis is whether it is reasonably foreseeable that the decision will have an effect upon the University. The Commission has held that the effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required but, if the effect is a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

In your letter you ask whether Councilmember Gatti's receipt of over \$250 in income from the University automatically renders the effect of the decision reasonably foreseeable. As is evident from the discussion above, the foreseeability analysis occurs after and is separate from the initial consideration of whether Section 87103 applies at all. Therefore, Councilmember Gatti's mere receipt of income from the University does not determine whether or not the effect of the decision is reasonably foreseeable.

Assuming that it is reasonably foreseeable that the decision will affect the University, we next determine whether the decision will have a material financial effect upon the University. Regulation 18702 (copy enclosed) sets forth the approach to the materiality analysis. Generally, if the decision directly affects an official's economic interest, the question of materiality is analyzed under Regulation 18702.1 (copy enclosed). If the decision indirectly affects an official's economic interest, the question is analyzed under Regulations 18702.2 through 18702.6 (copies enclosed). (Regulation 18702(a).)

Regulation 18702.1(b) defines when a person or business entity is directly involved in a decision before the official's agency. It states:

A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

If, on the basis of this subdivision, it is determined that the University is directly involved in the city council's decision, then the materiality tests set forth under subdivision (a) of Section 18702.1 will apply. Under subdivision (a)(1) of this section, the effect of the decision is considered material if:

...Any person (including a business entity) which has been a source of income ... to the official of \$250 or more in the preceding 12 months is directly involved in a decision before the official's agency

Based upon this section, where the University is directly involved in a decision before the city council, the decision has a material financial effect upon the University.

If the decision is not determined to have a direct effect on the official's economic interest under Section 18702.1, then it must be determined whether there is an indirect effect under Regulations 18702.2 through 18702.6. The section applicable to the University in this situation is Regulation 18702.5. This regulation defines whether a decision which indirectly affects a nonprofit entity that is a source of income to the official is material.

As set forth in Regulation 18702.5, whether the effect of the decision is material in this situation is based upon the nonprofit entity's gross annual receipts and the effect of the decision upon the entity's gross annual receipts, expenses, assets or liabilities. Essentially, if the effect of the decision is not direct but nevertheless affects the entity in a manner covered by Regulation 18702.5, then the effect would be indirect but material to Councilmember Gatti's financial interest.

Scott C. Smith, Esq.
January 25, 1989
Page 7


In your letter you inquire whether the decision can be material to an official if it has no effect on whether he or she would receive additional business from the entity that is his or her source of income. As explained in the analysis above, the focus of the materiality question is not upon whether the official will receive additional business, but upon whether the decision will have a material financial effect on his or her source of income. If there is a material financial effect and the official has exceeded the threshold income amount set forth in Section 87103, the official is deemed to have a financial interest in the decision.

The final determination is whether the "public generally" exception applies. Under this exception, the official is not prohibited from participation in the decision if the decision's effect upon the official's financial interest is not distinguishable from its effect upon the public generally. Regulation 18703 states that a decision's effect is distinguishable from the effect upon the public generally "unless the decision will affect the official's interests in substantially the same manner as it will affect all members of the public or a significant segment of the public." On the basis of this provision, if a decision comes before the city council that will affect the University in substantially the same manner that it affects the public, then Councilmember Gatti will be permitted to participate in it. Of course, any specific determination made under this provision like those above, will depend upon the factual circumstances of the decision itself.

I hope that this has been of assistance in your analysis of Councilmember Gatti's situation. If you desire to submit additional information to us concerning this matter we will provide additional assistance. However, should you have any questions concerning this letter, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Scott Hallabrin
Counsel, Legal Division

DMG:SH:ld

Enclosures

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California Fair Political
Practices Commission
Legal Division
428 "J" Street
Suite 800
Sacramento, California 95804-0807

Dear Sir or Madam:

FACTS

QUESTION

Is Councilman Gatti precluded by the Political Reform Act and the new FPPC regulations filed on November 17, 1988 from participating in decisions regarding the University of La Verne?

LAW OFFICES OF
BEST, BEST & KRIEGER

California Fair Political
Practices Commission
December 2, 1988
Page Two

ANALYSIS OF QUESTION

Under former and new Section 18.702.1 of Title 2 of California Code of Regulations, \$250 of income received during the preceding twelve months triggers a conflict of interest analysis. Section 82030 of the Political Reform Act (the "Act") defines "income" broadly to mean "proceeds from any sale," and would appear to cover all gross proceeds of sales by Mr. Gatti's business since he is the sole owner of the business.

New Section 18702 provides that Section 18702.1 will apply for determining whether "the reasonably foreseeable effects of [a] decision will be material" with respect to a source of income. Section 18702.1(a)(1) provides that the effect of the decision is material if any person that is a source of income of \$250 or more is "directly involved in the decision appears before the official's agency." A person who is a "source of income" appears before an official's agency when it seeks a license, permit, entitlement, or a contract with the agency. (2 Cal. Code of Regulations §18702.1(b).) In short, new Section 18702 seems to say that where an official has done \$250 or more in business with a person appearing before the official's agency, it is automatically determined that the decision will have a reasonably foreseeable material effect on that source of income.

In Councilman Gatti's case, this would mean that any time the source of \$250 or more of business with Mr. Gatti appears before the City Council, Mr. Gatti will have to disqualify himself without determining whether his decision would make it more likely or less likely that he would receive additional business from that source of income during the coming year.

We would appreciate a response from you on this subject to aid us in interpreting the new regulation.

Yours truly,



Scott C. Smith
for Best, Best & Krieger
City Attorneys
City of La Verne

SCS/ph

cc: Patrick Gatti
Martin Lomeli



California Fair Political Practices Commission

December 8, 1988

Scott C. Smith
Best, Best & Krieger
P.O. Box 1028
Riverside, CA 92502

Re: 88-456

Dear Mr. Smith:

Your letter requesting advice under the Political Reform Act was received on December 6, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Scott Hallabrin, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan

Diane M. Griffiths
General Counsel

for

DMG:plh
cc: Councilmember Patrick Gatti